SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Diane Runyon v. Maureen B. Smith, Ph.D (A-47-99)

(NOTE: The Court wrote no full opinion in this case. Rather, the Court's opinion is based substantially on the written opinion of the Appellate Division.)

Argued March 28, 2000 -- Decided May 10, 2000

PER CURIAM

This appeal concerns the psychologist-patient privilege.

On January 30, 1995, Diane Runyon sought and obtained a temporary restraining order (TRO) prohibiting her husband, Guy Runyon, from returning to the marital home. Mr. Runyon sought an immediate hearing on January 31, 1995, to contest the issuance of the TRO because he believed Diane Runyon posed a danger to their children. The record is silent as to whether Diane obtained notice of this hearing; she did not appear.

Mr. Runyon called Dr. Maureen Smith, a licensed clinical psychologist, as his first witness. Dr. Smith, who had treated Diane over a five-year period, expressed concern for the welfare and safety of the children. She testified that Diane did not have a history of a good relationship with the children; that Diane had been somewhat of an absentee mother in the past two years; that Diane had been physically and verbally abusive with her oldest son; and that Diane had an obsessive compulsive personality and was involved with a cult-like group. Dr. Smith testified that Mr. Runyon had an excellent relationship with his children and was the primary parent.

A close friend of Diane's also testified, stating that it would be in the best interest of the children to be with their father. Guy Runyon also testified. He confirmed the fact that Diane had used physical violence on their eldest son.

The Family Part judge, finding Dr. Smith's testimony very persuasive, modified the TRO by granting temporary custody of the children to Mr. Runyon.

Subsequent to the January hearing, Dr. Smith submitted to the court a written report dated June 19, 1995, wherein she was critical of Diane Runyon, concluding that it would be a mistake to expose the children to "the ideology of a woman with obvious thought disorders...." This report was relied on to severely restrict Diane's access to her children. Mr. Runyon was awarded custody of the children.

On January 21, 1997, Diane Runyon filed a complaint for monetary damages against Dr. Smith and her employer, Psychological Associates, alleging that Dr. Smith violated the psychologist-patient privilege and the rules and regulations governing psychologists by providing fact and opinion testimony at the January hearing that was based on information learned from counseling sessions with Diane. Further, Diane alleged that Dr. Smith submitted a written report and certification that contained false and inaccurate information.

After filing an answer to the complaint, Dr. Smith and Psychological Associates moved for summary judgment, arguing that the doctor's testimony at the January hearing was necessary to protect the best interests of the children. Diane Runyon filed a cross-motion, arguing that even if Dr. Smith was entitled to breach the privilege, the doctor did not have immunity to make false and inaccurate statements. The court granted partial summary judgment on the issue of piercing the privilege. The court reserved decision on the immunity issue.

In August 1997, Dr. Smith and Psychological Associates filed a second motion for summary judgment, arguing that false and inaccurate testimony by a witness in a judicial proceeding is immunized from liability. The

court agreed and dismissed Diane Runyon's remaining claims with prejudice.

Diane Runyon appealed. The Appellate Division reversed the entry of summary judgment in favor of Dr. Smith and remanded for further proceedings. The Appellate Division reasoned that the three-pronged test must be satisfied in order to pierce the psychologist-patient privilege: 1) there must be a legitimate need for the evidence; 2) the evidence must be relevant and material to the issue to be decided; and 3) the information sought cannot be secured from any less intrusive means. The Appellate panel concluded that there was no attempt by the judge to apply this test and that the third prong of the test was not satisfied. More importantly, the panel concluded that there was no reasonable explanation for the submission of the January 19th report. The Appellate Division found that Dr. Smith's testimony at the January hearing and her subsequent report violated the psychologist-patient privilege.

According to the Appellate Division, if a psychologist fails to raise the privilege of the patient and makes disclosure of confidential information without a determination by the court that disclosure is required, the psychologist has breached the duty owed to the patient and the patient has a cause of action against the psychologist for the unauthorized disclosure of confidential information received in the course of treatment.

The Supreme Court granted certification.

HELD: Judgment of the Appellate Division is affirmed substantially for the reasons expressed in the opinion of the Appellate Division. If a psychologist fails to raise the patient's privilege and discloses confidential information without a court determination that disclosure is required, the psychologist has breached the duty owed to the patient and the patient has a cause of action against the psychologist for the unauthorized disclosure of information obtained in the course of treatment.

1. On this inadequate record, the Court is unable in hindsight to assess whether the testimony of Mr. Runyon and Diane's friend provided an adequate basis for the temporary custody award. Nevertheless, Dr. Smith's testimony and her report violated the psychologist-patient privilege. (Pp. 2- 3)

2. Nothing in this record demonstrates that the children were exposed to such a degree of danger that would trigger the statutory duty to warn. (Pp. 3-4)

3. The fact that Diane Runyon may not prevail on her claim for damages does not affect her right to pursue that claim. (Pp.4)

JUSTICE O'HERN, dissenting, in which the **CHIEF JUSTICE joins**, notes that, even assuming that Diane Runyon could establish by competent expert testimony that Dr. Smith's conduct fell below the acceptable standard of care, there are no recoverable damages. The trial court has already determined that not only would Dr. Smith's evidence have been admissible in the custody action, the outcome of the custody dispute would have been the same whether or not the evidence was introduced; thus, no viable claim for emotional distress damages has been presented. This is a matter better suited to be addressed in the arena of professional responsibility.

JUSTICES STEIN, COLEMAN, LONG, VERNIERO, and LAVECCHIA join in this PER CURIAM opinion. JUSTICE O'HERN filed a separate dissenting opinion in which CHIEF JUSTICE PORITZ joins.

SUPREME COURT OF NEW JERSEY
A-47 September Term 1999

DIANE RUNYON,

Plaintiff-Respondent,

v.

MAUREEN B. SMITH, Ph.D and
PSYCHOLOGICAL ASSOCIATES,

Defendants-Appellants.

Argued March 28, 2000 -- Decided May 10, 2000

On certification to the Superior Court, Appellate Division, whose opinion is reported at 322 N.J. Super. 236 (1999).

John R. Gonzo argued the cause for appellants (Harwood Lloyd, attorneys).

Charles J. Lange, Jr., argued the cause for respondent.

PER CURIAM

We affirm the judgment of the Appellate Division substantially for the reasons set forth in its comprehensive opinion. Runyon v. Smith, 322 N.J. Super. 236 (1999). We add these observations to clarify the basis for our disposition and to address the concerns of our dissenting colleagues.

We recognize the dissent's concern about instances in which the psychologist-patient privilege must yield because of "the potential of harm to others." Post at __ (slip op. at 1) (O'Hern, J., dissenting). In Kinsella v. Kinsella, 150 N.J. 276, 316 (1997), adverting to that very concern, we observed that "[b]ecause of the unique nature of custody determinations, the scope of the patient-psychiatrist privilege that may be claimed by parents in relation to custody issues poses more difficult problems that those posed by the scope of the privilege in other situations." We specifically acknowledged in Kinsella that courts in custody disputes "must strike a balance between the need to protect children who are in danger of abuse and neglect from unfit custodians and the compelling policy of facilitating the treatment of parents' psychological or emotional problems." Id. at 327.

We are not prepared on this inadequate record to agree unqualifiedly with the Appellate Division's conclusion that, even absent Dr. Smith's testimony, "there was sufficient evidence from plaintiff's friend and from Mr. Runyon to justify awarding temporary custody of the children to Mr. Runyon." 322 N.J. Super. at 245. We simply cannot assess in hindsight whether the testimony of Mr. Runyon and that of plaintiff's friend provided an adequate basis for the Family Part's temporary custody award. Nevertheless, all parties acknowledge that the Family Part did

not conduct the in camera review contemplated by Kinsella, 150 N.J. at 328, and apparently did not make the appropriate determination on the record that evidence of fitness from other sources was inadequate. We also acknowledge that the hearing in question took place more than two years before Kinsella was decided. However, we cannot turn back the clock and determine now whether adherence to the Kinsella standards and procedures would have permitted the privilege to be pierced. Indisputably, those standards and procedures were not observed. We therefore conclude, as did the Appellate Division, 322 N.J. Super. at 246, that "Dr. Smith's testimony at the January hearing and her subsequent report violated the psychologist-patient privilege."

We acknowledge that in certain circumstances a psychologist may have a duty to warn and protect third parties or the patient from imminent, serious physical violence. As part of that duty, the psychologist would be required to disclose confidential information obtained from a patient. See N.J.S.A. 2A:62A-16. Nothing in this record demonstrates that the children were exposed to danger of a degree that approached the level of danger that triggers the statutory duty to warn. Moreover, Dr. Smith's testimony occurred about six months after her last session with plaintiff. That six-month interval is itself inconsistent with the statutory standard of "imminent serious physical violence." N.J.S.A. 2A:62A-16b(1).

We also are in accord with the Appellate Division's conclusion that a psychologist who fails to assert her patient's privilege and discloses as a witness confidential information concerning that patient without a court determination that disclosure is required may be liable for damages to the patient. See Stempler v. Speidel, 100 N.J. 368, 375-77 (1985) (discussing liability of physicians in general for unauthorized disclosure of confidential information). The dissent argues persuasively, however, that plaintiff incurred no recoverable damages as a result of Dr. Smith's disclosures, asserting that the result of the custody dispute would have been the same even if her testimony had been excluded. Post at ___ (slip op. at 3-4) (O'Hern, J., dissenting). That plaintiff may not prevail on her claim for damages does not affect her right to pursue it. Because the issue is not before us, however, we express no view on the merits of plaintiff's claim.

Affirmed.

JUSTICES STEIN, COLEMAN, LONG, VERNIERO, and LAVECCHIA join in this opinion.

SUPREME COURT OF NEW JERSEY
A-47 September Term 1999

DIANE RUNYON,

Plaintiff-Respondent,

v.

MAUREEN B. SMITH, PH.D. and
PSYCHOLOGICAL ASSOCIATES,

Defendants-Appellants.

O'HERN, J., dissenting.

I agree with the substantive analysis of the Appellate Division's restatement of the manner in which a psychologist should exercise responsibility in preserving a patient's confidences. Those principles were set forth in our decision in Kinsella v. Kinsella, 150 N.J. 276 (1997). Resolution of the Kinsella issues is but the beginning of the analysis, not the end.

Psychologists labor under conflicting sets of duties. They have a duty to respect the confidences of a patient, but exceptions do exist. Psychologists cannot always ignore the potential for harm to others.

> The seminal case regarding the duty of a psychiatrist [or psychologist] to protect against the conduct of a patient is Tarasoff v. Regents of Univ. of Cal., 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). In Tarasoff the plaintiffs alleged the defendant therapists had a duty to warn their daughter of the danger posed to her by one of the therapists' patients. The Tarasoff

> plaintiffs were parents of Tatiana Tarasoff, a young woman killed by a psychiatric patient. Two months prior to the killing, the patient informed his therapist that he intended to kill a young woman. Although the patient did not specifically name Tatiana as his intended victim, plaintiffs alleged, and the trial court agreed, that the defendant therapists could have readily identified the endangered person as Tatiana.
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> Applying Restatement (Second) of Torts § 315 (1965) to the facts before it, the Tarasoff court held the patient-therapist relationship was sufficient to support the imposition of an affirmative duty on the defendant for the benefit of third persons. Tarasoff, 17 Cal. 3d at 435, 131 Cal. Rptr. 14, 551 P.2d 334. The Tarasoff court ruled that when a psychotherapist determines, or, pursuant to the standards of the profession, should determine, that a patient presents a serious danger of violence to another the therapist incurs an obligation to use reasonable care to protect the intended victim against such danger. Tarasoff, 17 Cal.3d at 435, 131 Cal. Rptr. 14, 551 P.2d 334. According to the Tarasoff court, discharge of the duty may require the therapist to take whatever steps are necessary under the circumstances, including possibly warning the intended victim or notifying law enforcement officials.
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> [Petersen v. State, 671 P.2d 230, 236 (Wash. 1983) (emphasis added).]

This psychologist may have erred in not asserting her patient's privilege. She may have believed that she was under a duty to do so, being in the presence of a court that expressed no concern for the propriety of her conduct. One thing is clear, there is no evidence that she intended to do anything but that which was best for the involved children.

We generally try to avoid "unnecessary court events." State v. Shaw, 131 N.J. 1, 13 (1993). We should do that here. Although Kinsella had not been decided when the psychologist testified in the custody case, the trial court was fully aware of the principles of Kinsella when it dismissed the patient's subsequent complaint for malpractice. The trial court was also fully aware of the principles that govern a professional malpractice action against a psychologist.

> The plaintiff in a malpractice action based on tort must establish four elements to make out a prima facie case. . . . When the plaintiff is a patient and the defendant is the patient's therapist, Schultz tells us that the four key elements necessary to prove malpractice are: "(1) that a therapist-patient relationship was established; (2) that the therapist's conduct fell below the acceptable standard of care; (3) that this conduct was the proximate cause of the injury to the patient; and (4) that an actual injury was sustained by the patient." In the particular case of a patient suing a therapist for breach of confidentiality, the most difficult hurdles to overcome, showing malpractice has taken place, are "whether the standard of care to which the psychotherapist is obliged to conform encompasses confidentiality, whether the duty is breached by disclosure and whether recoverable damages are incurred."
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> [Ellen W. Grabois, The Liability of Psychotherapists for Breach of Confidentiality, 12 J.L. & Health 39, 68-69 (1998).]

Even assuming that plaintiff can establish by competent expert testimony that Dr. Smith's conduct fell below the

acceptable standard of care,[1] no "recoverable damages" were incurred. Grabois, supra, 12 J.L. & Health at 69.

In the analogous context of attorney malpractice in a custody dispute,

> [t]he client bringing a legal malpractice action has a heavy burden. The plaintiff must effectively prove two cases; the one giving rise to the malpractice action, and the one for legal malpractice. For example, in a malpractice action stemming from a child custody dispute, the jury must determine the custody issue, using the appropriate legal principles in order to make a determination of the legal malpractice action. The case-within-a-case approach speaks to the elements of causation and damages, for only after making a determination of the case below can a jury find that the attorney's negligence was the proximate cause of the client's loss. If a jury finds the attorney was in fact negligent, but the underlying claim would have, absent this breach of duty, been resolved in the same manner, it cannot be said that the attorney's negligence caused damage.
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> [Andrew S. Grossman, Avoiding Legal Malpractice In Family Law Cases: The Dangers of Not Engaging in Formal Discovery, 33 Fam. L.Q. 361, 367 (1999).]

The trial court has already determined that not only would the psychologist's evidence have been admissible in the custody action, the outcome of the custody dispute would have been the

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[1]Even if the Tarasoff principles did not authorize disclosure, "statements made during joint counseling are not privileged in litigation between the joint patients." Redding v. Virginia Mason Medical Center, 878 P.2d 483, 485 (Wash. Ct. App. 1994). Dr. Smith counseled the parties jointly.

same whether or not the evidence was introduced.

No viable claim for emotional distress damages has been presented.

> Damages for [negligent infliction of] emotional distress must be "so severe that no reasonable man could be expected to endure it." Buckley v. Trenton Savings Fund. Soc., 111 N.J. 355, 366-67 (1988) (citation omitted). Determination of whether emotional distress can be found in a particular case is a question of law for a court to decide, leaving the jury to decide if it had been proved in fact. Id. at 367. Here, plaintiff's upset, embarrassment and anxiety are no more severe than was Buckley's loss of sleep, aggravation, headaches, nervous tension and embarrassment which the Supreme Court held was not severe. As in Buckley, because there is no severe emotional distress, further examination into the intent of the tortfeasor is not warranted.
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> [Rocci v. MacDonald-Cartier, 323 N.J. Super. 18, 25 (App. Div. 1999).]

In short, the Court has perceived the tip of the iceberg. The Court would do well to look under the surface of the water to perceive the formidable reasons why this case should be concluded. A futile rerun of the custody trial will only serve to reopen old wounds. It is time to end the discord. Lawsuits are not the solution to every problem. Ethics disciplinary boards are better suited to resolving this problem.

> For most licensed and trained psychotherapists, this confidential relationship will be spelled out in professional ethical codes and state statutes. Therapists, therefore, must be alert to situations in which they are called

> upon to reveal information about their patients. Therapists are protected by privilege statutes, but exceptions do exist. Psychotherapists must educate themselves with respect to these statutes, especially since we live in a time in which third party payors and others will seek to know more about the patient's prognosis and the usefulness of the psychotherapy. Patients, too, must be alert and inquisitive, and ask that their therapists inform them of any requests for confidential information.
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> [Grabois, supra, 12 J.L. & Health at 84.]

Because the issue remaining in this case is one of professional responsibility, not one of "recoverable damages," I would reinstate the judgment of the Law Division dismissing the plaintiff's complaint for malpractice.

The Chief Justice joins in this opinion.

SUPREME COURT OF NEW JERSEY

NO. A-47 SEPTEMBER TERM 1999

ON APPEAL FROM

ON CERTIFICATION TO Appellate Division, Superior Court

DIANE RUNYON,

Plaintiff-Respondent,

v.

MAUREEN B. SMITH, Ph.D and
PSYCHOLOGICAL ASSOCIATES,

Defendants-Appellants.

DECIDED May 10, 2000

Chief Justice Poritz PRESIDING

OPINION BY Per Curiam

CONCURRING OPINION BY

DISSENTING OPINION BY Justice O'Hern

CHECKLIST	AFFIRM	REVERSE AND REINSTATE	
CHIEF JUSTICE PORITZ		X	
JUSTICE O'HERN		X	
JUSTICE STEIN	X		
JUSTICE COLEMAN	X		
JUSTICE LONG	X		
JUSTICE VERNIERO	X		
JUSTICE LaVECCHIA	X		
TOTALS	5	2	